Supreme Court, U.S.
FILED

(1) 96 729 NOV 1 1996

NO. 96-
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ANITA L. BOWDEN

Petitioner,

v.

PUBLIC BUILDING COMMISSION OF CHICAGO

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE ILLINOIS APPELLATE COURT,
FIRST DISTRICT

PETITION FOR WRITE OF CERTIORARI

ANITA H. BOWDEN
55 WEST CHESTNUT STREET
CHICAGO, ILLINOIS 60610
(312) 642-6045

55 pp

QUESTIONS PRESENTED FOR REVIEW

Whether the Illinois Appellate Court, which affirmed the trial court's decision, violated principles of causation established in Whitaker v. Coleman, (CCA5th, 1940) 115 F2d 305 and Richard v. Credit Suisse, 242 N.Y. 346, 152 N.E. 110,111 (1926) in summary judgment motions, statutes of limitations, and "discovery rule" by concluding that Plaintiff/Anita Bowden filed her lawsuit more than two years after the accrual of her cause of action, granting motion of summary judgment to defendant/Public Building Commission of Chicago (PBCC) and dismissing Plaintiff's personal injury case due to chemical exposure.

Whether the Appellate Court violated Plaintiff's constitutional rights.

Whether the Appellate Court discriminated against Plaintiff who is an African-American female with a mental handicap who received inefficient assistance of counsel.

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II. THE PETITION PRESENTS IMPORTANT ISSUES REGARDING THE ELEMENT OF CAUSATION IN SUMMARY JUDGMENT MOTIONS IN A PLAINTIFF'S PERSONAL INJURY CASE DUE TO CHEMICAL EXPOSURE.

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STATUTES

28 U.S.C.A. - Rule 56
42 U.S.C.A. - 9658 (b) (4) (B) (ii)
First, Fifth, Seventh, Fourteenth Amendments to Constitution of United States
Section 13 of Bill of Rights of Illinois Constitution

ORDERS BELOW

The order of the Illinois Supreme Court (App. 4); Illinois Appellate Court (App. 16); and Circuit Court of Cook County, Illinois (App. 27).

JURISDICTION

The order of the Illinois Appellate Court was entered on 9/29/95. The jurisdiction of this Court is involved pursuant to 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

This case concerns the proper application of: (1) summary judgment, 28 USCA - Rule 56; (2) Actions under federal law for damages from exposure to hazardous substances; statutes of limitations for hazardous substances; federally required commencement date for an incompetent individual, 42 U.S.C.S. § 9658 (b) (4) (B) (ii); (3) Violation of Petitioner's rights under the First, Fifth, Seventh, and Fourteenth Amendments of the Constitution of the United States and Section 13 of the Bill of Rights of the Illinois Constitution.

Pertinent statutory provisions are reprinted in the Appendix of this petition (App. 28).

STATEMENT OF THE CASE

Plaintiff/Petitioner retained an attorney in May 1992 to file a personal injury lawsuit due to her exposure to chemical fumes on 9/12/91. Her lawyer field the suit on 1/28/93.

Trial court granted defendant's motion for summary judgment. Her first attorney appealed but included some incorrect and incomplete information in the Plaintiff's response to defendant's motion for summary judgment and the appeal. The correct and complete information is in the records but the Appellate Court denied Appellant's motion to correct record on appeal.

Some of the correct information is that when Plaintiff worked in the Biochemistry Lab she did NOT think she was exposed to those specific chemicals which emanated from the Chemistry Lab - which are the chemicals that Dr. Greene and Dr. Vuckovich said caused Plaintiff's lung and brain injury/illness.

The Illinois Appellate Court entered its judgment on 9/29/95. A petition for rehearing was filed 1/5/96. It was denied on 1/23/96. An affidavit of intent to seek review in the Illinois Supreme Court was filed 2/9/96. A motion for an extension of time was filed on 2/21/96. A petition for leave to appeal was filed 3/26/96. It was denied on 6/5/96. A request for an extension of time to file a petition for writ of certiorari was filed on 8/13/96 in Supreme Court of U.S. On

8/19/96. Justice Stevens granted the extension of time to and including November 2, 1996.

I. The Appellate Court improperly determined that Plaintiff knew or reasonably should have known of her injury two or more years prior to her filing a lawsuit.

A. When Plaintiff knew or reasonably should have known of her injury is a genuine issue of material fact, which requires jury determination.

II. The Appellate Court failed to evoke the "discovery rule" in analyzing Plaintiff's cause. The "discovery rule" as first adopted in Rozny v. Marnul, (1969), 43 Ill. 54, 72-73, 250 N.E.2d 656, states that:

A. The commencement of the relevant statute of limitations is postponed until the injured Plaintiff knows or reasonably should know that she has been injured; and

B. that the injury was wrongfully caused.

III. The Appellate Court placed excessive emphasis on the "continuing tort" theory and, by doing so, failed to evoke the "discovery rule" whose application was proper in this instance.

This case involves a personal injury due to chemical exposure sustained by the Plaintiff, Anita Bowden, in a building where she worked, which was owned by the Defendant, Public Building Commission of Chicago (PBCC) which is not the City of Chicago.

Over the course of approximately fourteen (14) years, 1972-1986, and from 9/93 through mid December 1993, Plaintiff was exposed to various toxic substances, namely Methyl Isobutyl Ketone, Ammonium Pyrrolidine Dithiocarbamate, Trichloroacetic Acid, Sodium Hydroxide, and Mercury (hereinafter the "Chemicals"). Plaintiff's exposure occurred in the Hematology/Baby (LL-75) and Clinical Chemistry (LL-76) laboratories (hereinafter "Chemistry Labs") in the second basement of the Daley Center.

From 1986 to 9/93, with the exception of one day, 9/12/91, Plaintiff worked in the biochemistry laboratory which was also in the second basement of the Daley Center, rooms LL-163, 164, 166, 168, and 170. When the plaintiff worked in the biochemistry labs she did not think she was still exposed to those specific chemicals/fumes which emanated from the "Chemistry Labs."

Plaintiff's exposure culminated in a singular traumatic event, when on 9/12/91, Plaintiff was transferred from the biochemistry laboratory o the "Chemistry Lab" where she was overcome by the chemical fumes and was rushed by ambulance to the emergency room at Northwestern Memorial Hospital for immediate medical attention. It was later determined that Plaintiff's continuous exposure to the chemical fumes resulted in permanent lung and brain damage. (Defendant's-Appellee's Brief, page 125) & (R71).

Plaintiff was on sick leave from 9/12/91 to 10/23/91. She returned to work in the Biochemistry lab until that lab closed permanently in 9/93. She was transferred back to the Chemistry Lab where she stayed until mid December 1993. All City labs were permanently closed by the end of 1993.

After her 9/12/91 injury, Plaintiff inquired about the harmful chemical fumes which emanated from the Chemistry Lab, and the overall poor ventilation system therein. Plaintiff received a 10/14/91 letter from the Health Department Deputy Commissioner, Richard H. Sewell, which stated that funds had been recently allocated to correct the air quality problems in the Chemistry Lab. (Defendant's-Appellee's Brief pages, 271-272.)

During Plaintiff's tenure at the Chemistry Lab she became concerned about various ailments she was experiencing, including headaches, nausea, burning eyes, and respiratory problems. Accordingly, she visited a doctor in 1985. This visit, however, never linked her symptoms with her exposure to the chemicals. It was not until after her trauma in 1991, that a definitive link was found between her ailments and her chemical exposure. A letter from lung specialist, Dr. Andrew Green, confirms this. Dr. Greene's letter, dated 4/16/92, signifies the definitive point when Plaintiff learned of her injuries. It was not until 1994 that Dr. M. Vickovich, MD, a neurologist, informed Plaintiff of a brain dysfunction due to the same chemicals/fumes (R147 & R148). Plaintiff filed her complaint on 1/28/93.

REASONS FOR GRANTING WRIT

I. THE APPELLATE COURT DECISION DIRECTLY CONFLICTS WITH RECENT DECISIONS OF THIS COURT AND OTHER CIRCUITS ON THE ELEMENT OF CAUSATION FOR SUMMARY JUDGMENT MOTIONS.

The Illinois courts did not appear to use the rules and guidelines in Plaintiff's case as Federal and other State courts used in granting or not granting summary judgment to Defendant. Plaintiff's case was ruled on differently than cases with similar circumstances. Examples follow.

Beryllium Co. v. Meckley , (1990) 284 F2d 797, involves an action against corporation were Plaintiff developed berylliosis alledgedly as a result of the corporation's careless and negligent expulsion of noxious gases from its plant over a long period of time. The cruicial issue is whether or not the two year statute of limitations bars an action for damages caused by a disease of slowly insidious development in the respiratory tract.

The United States District Court for the Northern District of Ohio, J. Conel, entered order denying corporation's motion for summary judgment.

Cameron v. Vancouver Plywood Corp., (CA9th, 1959) 266 F2d 535, 540. ("All doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for summary judgment...It is especially

necessary to be cautious in making such a determination where, as here, a jury trial has been demanded."

Quiming v. International Pacific Enterprises Ltd. D. Hawaii (1990) 773 F.Supp.230. When direct evidence produced by party moving for summary judgment conflicts with that produced by nonmoving party, judge must assume truth of evidence set for by nonmoving party with respect to that fact.

Urie v. Thompson (1949) 337 US 163, 93 Led 1282, 69 S Ct. The Supreme Court of the United States held that contraction of silica dust over a period of 30 years did not, pursuant to the three year limitation in the Federal Employer's Liability Act, 45 USCA §51 et seq, bar the injured person's suit for compensation where he might have had the disease without knowing it for more than three years before he sued for compenation. The time elapsing between his discovery of his condition and the filing of his suit was not regarded as being in excess of the three year limitation period.

Weinberger v. Hynson, Westcott & Dunning (1973) 412 US 609, 621-22, 93 S CT 2469, 37 Led2d 207. ("If this were a case involving trial by jury as provided in the Seventh Amendment, there would be sharper limitations on the use of summary judgment....")

Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party's right to judgment is clear and free from doubt.

Espinoza v. Elgin, Joliet & Eastern Railway Co. (1955), 165 Ill.2d, 107, 113, 649 N.E.2d 1323. Although summary judgment is encouraged to aid the expeditious disposition of a lawsuit, it is a drastic means of disposing of litigation. Id. at 113. The Court must construe all evidence strictly against the movant and liberally in favor of the moving party. Id. at 114. Therefore, where "reasonable persons" could draw divergent inferences from the undisputed material facts or where there is a dispute as to material fact, summary judgment should be denied. Id. at 114. Plaintiff has neurological and psychological problems and does not fulfill requirement of a "reasonable person."

At issue is the contention that the Appellate Court has failed to recognize that a material issue of act still exists as to when Plaintiff knew or reasonably should have known of her injuries, and reasonably should have know that her injuries were caused by the wrongful acts of Defendant, and therefore summary judgment was improper and the matter should be submitted to a jury for review and determination.

This Court in its Order states that the facts in this matter were not in question. See Court's Order at pg. 4. To support this conclusion the Court wrote: "The Plaintiff does not dispute that she knew the Defendant had wrongfully caused her injuries for more than two years prior filing her complaint." See Record at 4. This is wrong. The Court misconstrued the evidence before it. Plaintiff, in fact, does

dispute the contention that she was aware of any injury wrongfully caused to her by Defendant, prior to 4/16/92.

There is a crucial distinction which must be pointed out here, Plaintiff complained of various ***discomforts*** while working in the Chemistry Lab not verifiable ***injuries***. And every though Plaintiff had actually been wrongfully injured by Defendant during this period, because she was not aware of her injury, or could not be held to a standard in which she reasonably should have been, the statute cannot be said to have commenced to run. The "discovery rule" postpones the commencement of the relevant statute of limitations until the injured Plaintiff knows or reasonably should know that she has been injured and that her injury was wrongfully caused. Rozny v. Marnul, (1969), 43 Ill. 2d 54, 72-73, 250 N.E.2d 56. Also Plaintiff has neurological and psychological problems and does not fulfill the requirement for a "reasonable person."

It was not until 4/16/92 that Plaintiff first learned of her injury, and in fact is the only time she could be held to a standard in which she reasonably could have learned of the injury. It was the first time Plaintiff had confirmed proof that she was wrongfully injured by the Defendant. Pursuant to a medical consultation, Dr. Greene, in his 4/16/92 letter informed Plaintiff that she suffered from injuries due to exposure to the exact toxic chemical substances found in the Chemistry Labs, and now suffers permanent lung damage.

In the trial, Plaintiff's first attorney argued a "continuing tort" theory, while simultaneously evoking the "discovery rule." But while the Court rejected Plaintiff's "continuing tort" theory, the Court failed to rule on Plaintiff's application of the "discovery rule." The Court should now reconsider this prior ruling and turn its attention to the date of discovery of the injury. There exists a material issue of fact as to when Plaintiff knew or reasonably should have known of her injuries.

Ironically, the very case that the Court cited as "directly applicable" to support the court's prior ruling is equally applicable to support Plaintiff's claim that she did not gain reasonably knowledge of her injuries until much later, and that the discovery rule should be evoked. Nolan v. Johns-Manville Asbestos, (1981), 85 Ill2d 161, 171, 421 N.E.2d 864. Nolan concerned an asbestos exposure claim. Plaintiff had worked as an asbestos insulator from 1941 to 5/11/73, and he had filed his claim for injuries sustained therefrom on 5/9/75. The trial court entered summary judgment against him, and Plaintiff appealed. The issues addressed by the Court were:

(1) whether Plaintiff had properly pleaded and was entitled to an application of the "discovery rule" under the circumstances of the case, and

(2) if so, whether there were genuine issues of fact relating to the application of the rule. Id. 421 N.E.2d at 864.

The Plaintiff in his work was required to apply asbestos and fiberglass pipe coverings for the purpose of insulating hot and cold heating ducts. Nolan at 865. In 1957, after 16 years of work, Plaintiff began experiencing problems such as generalized weakness throughout his body, shortness of breath, and a little difficulty in climbing stairs and carrying heavy equipment and materials while working. After these developments, Plaintiff had his x-rays taken at a mobile tuberculosis unit. He was told at that point that there were some problems with his lungs and he should have it looked at. Plaintiff's family doctor advised him that there were lung problems but that his complaints were not strong enough to suggest a relationship with asbestos. He suggested the problem might be partially mental. Id.

In Nolan, Plaintiff continued to experience problems, but did not go back to the doctor until 1965 when his complaints became more pronounced. At that point, he was again told that he had problems with his lungs, but asbestosis was not mentioned. The Plaintiff, despite the fact that his doctor did not indicate any causal connection between his job and his problems, had a strong suspicion, as Appellant in this case had, that his physical condition and his exposure to asbestos and other fibrous products were related. Nolan at 865.

After his 1965 appointment with the doctor, Plaintiff sought no further medical attention until 1973 when the

symptoms became every more severe. It is important to note that after 1968 Plaintiff, was consistently inundated with information and articles concerning the relationship between asbestos and his pulmonary problems, yet even still the court refused to hold that he should have had reasonable knowledge of his injury at that time. Finally, in 1973, after a long period of testing and a lung biopsy, Plaintiff's suspicions were confirmed. On 6/23/73, Plaintiff wrote a letter to a union representative stating that he "had a lung biopsy that shows scar tissue and asbestos fibers... something that has been known for years but something that I had learned to live with till Friday May 11, the last day I worked..." Nolan v. Johns-Manville Asbestos, (1979) 74 Ill.App.3d 778, 784; aff'd. 1981, 85 Ill.2d 161, 421 N.E.2d 864.

The defendants in Nolan argued that Plaintiff's symptoms, as well as his awareness of the possible tie between his health problems and his work in 1957, which caused him to get chest x-rays, should have triggered the running of the two year statute of limitations. They also argued alternatively, that he should have known he had contracted asbestosis between 1965-1970, which would have caused the statute of limitations to expire some time between 1967 and 1970. All arguments by the defendants revolved around the theory that Plaintiff had learned of the connection between his work and his health problems long before the 1975 filing date. Nolan, 421 N.E.2d at 867.

Despite such testimony, the Appellate Court reversed the Summary Judgment determination, and the Illinois Supreme Court affirmed. Speaking on the issue of summary judgment, the Appellate Court stated:

> "Although recognized as a salutary procedure in the administration of justice it is a remedy which should be granted with caution so that the respondent's right to a trial, wherein the evidentiary portion of his case may be presented, is not usurped in the presence of material conflicting facts and inferences. The function of this procedure is to determine whether triable issues of fact exist in the record, not to try such issues. The right of the moving party to summary judgment must be clear, free from doubt and determinable solely as a question of law. If there is present any fact or facts on which reasonable persons may disagree, or inference which may be fairly drawn from those facts and may lead to different conclusions, the motion court must stay its hand and permit the resolution of those facts and inferences to be made at trial." Nolan, 74 Ill. App.3d at 794, aff'd 1981, 85 Ill.2d 161, 421 N.E.2d 864.

The Supreme Court agreed with the Appellate Court's assessment that a genuine issue of material fact existed as to when Plaintiff knew or reasonably should have know that his health problems were caused by the wrongful acts of another. Nolan, 85 Ill.2d 161, 421 N.E.2d 864, 869.

The current case before the court is analogous to the Nolan case. And although not an asbestos case, it's sequence of factual events are very similar, and the legal issues raised almost identical.

Plaintiff, Anita Bowden, worked in the Daley Center basement from 1972 to mid December 1993. The record shows that Plaintiff had misgivings and concerns about her work environment, just as the Plaintiff did in Nolan. And while working in the Chemistry Lab, where th exposure to the chemicals had occurred, she experienced symptoms of chemical exposure sickness, and exhibited suspicions which linked her ailments to the chemicals at her workplace, as did the Plaintiff in Nolan. And as in Nolan, at various times during her employment she visited doctors complaining of various discomforts which she thought might have been work related, but her suspicions were never confirmed, until much later.

Moreover, like the Plaintiff in Nolan, Ms. Bowden discussed her concerns and suspicions about her health and the environment in which she worked with certain personnel. In a letter dated 7/20/88, from the Plaintiff to the Commissioner of City Hall Personnel, Jesse Hoskins, the Plaintiff gives a veritable "laundry list" of ailments of which she believes she suffers, some of which she attributes to her exposure to chemicals in the Chemistry Lab. See Record pg. 95 & 111. The letter however, was, in reality, a chaotic ensemble of her fears, and a desperate attempt to convince City personnel to relocate her. It could also be seen as a frustrated attempt of a woman trying to gain the sympathy of her employer to transfer her to a new job and new job

site. In part, Plaintiff was fearful of easily contacting AIDS/HIV and other infections due to her low white blood cell count.

To interpret this letter as factual evidence of Plaintiff's knowledge of her injuries has no basis. None of the claims of injuries pertaining to chemical exposure contained in the letter are substantiated by medical evidence. Some of her claims could even be construed as rather outrageous.

The Appellee, however, contends that this letter is evidence of actual knowledge of her injuries and that they were wrongfully caused. As we have already shown, this conclusion is without merit. Please keep in mind that both prior to and after this letter was written the Plaintiff visited several physicians, none of whom attributed her ailments to chemical exposure. Only when Ms. Bowden was overwhelmed by chemical fumes on 9/12/91 and taken by ambulance to the emergency room at Northwestern Hospital, did the effects of Ms. Bowden's continuous exposure to the chemicals manifest themselves to detection. Following her trauma of 9/12/91, Plaintiff again underwent a series of tests. On 4/16/92, Ms. Bowden received a letter from Dr. Greene (addressed to her attending physician, Dr. Stevenson) which outlined her exposure to the specific chemicals found in the Chemistry Lab and her resulting injury, permanent lung damage.

For the foregoing reasons, it seems reasonable that there exists a genuine material issues of face as to when Plaintiff/Appellant, Anita Bowden, should have reasonably known of her injuries.

The facts in this case are disputed and summary judgment on the issues of when the action accrued is improper.

The trial court's decision and the Appellate Court's affirmation of such a decision accept as fact the argumentative ramblings of a woman who was admittedly ill with a disease that affected her lungs and, as she later discovered, her brain. Some of her statements directly contradict medical knowledge. Not saying anymore than this, one reasons that the trial and Appellate courts have given full weight to the Appellee's interpretation of the facts.

The Defendant's motion for summary judgment was confined to questions of liability to the Plaintiff and did not address questions allowing relief explanation, elaboration or defense by the Plaintiff.

In the interest of justice, review of this Court is essential to the resolution of this case, and so that guidance is provided to other petitioners likely to confront the same or similar issues.

II. THE PETITION PRESENTS IMPORTANT ISSUES REGARDING THE ELEMENT OF CAUSATION IN SUMMARY JUDGMENT MOTIONS IN A PLAINTIFF'S PERSONAL INJURY CASE DUE TO CHEMICAL EXPOSURE.

More people in the military have been exposed to chemical weapons while during the Gulf War in the Middle East. Some of these servicemen are just now associating their illness with chemical weapon exposure in Iraq and the Gulf War syndrome.

Summary judgment application should be more carefully weighed when used since more people today are exposed to various "new age" chemicals.

Going into the 21st century, the laws governing summary judgment, statutes of limitations, and discovery rule for chemical and germ exposure cases should be tempered.

Conclusions: For the foregoing reasons, the petition for a writ of certiorari should be granted.

November 1, 1996

Respectfully submitted,

Anita H. Bowden
55 W. Chestnut Street
Chicago, IL 60610

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SUPREME COURT OF THE UNITED STATES
For the First Circuit

No. A-123

ANITA L. BOWDEN
Petitioner

v.

PUBLIC BUILDING COMMISSION OF CHICAGO
Respondent

ORDER ON PETITIONER'S REQUEST FOR
EXTENSION OF TIME TO FILE A WRIT OF CERTIORARI

AUGUST 19, 1996

Honorable Justice Stevens

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, DC 20543

August 19, 1996

Ms. Anita H. Bowden
55 W. Chestnut
Chicago, IL 60610

Re: Anita H. Bowden
v. Public Building Commission of Chicago
Application No. A-123

Dear Ms. Bowden:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on August 19, 1996, extended the time to and including November 2, 1996.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By "s/Melissa A. Blalock"

Melissa A. Blalock
Assistant Clerk

NOTIFICATION LIST

Ms. Anita H. Bowden
55 W. Chestnut
Chicago, IL 60610

Gilbert S. Marchman
Appellate Court of Illinois
First District
160 N. LaSalle
14th Floor
Chicago, IL 60601

ILLINOIS SUPREME COURT
Juleann Hornyak, Clerk
Springfield, IL 62701

No. 80597

ANITA L. BOWDEN
Petitioner

v.

PUBLIC BUILDING COMMISSION OF CHICAGO
Respondent

ORDER

LEAVE TO APPEAL

JUNE 5, 1996

ILLINOIS SUPREME COURT
Juleann Hornyak, Clerk
Supreme Court Building
Springfield, IL 62701

June 5, 1996

Ms. Anita H. Bowden
55 W. Chestnut
Chicago, IL 60610

No. 80597 - Anita H. Bowden, petitioner, v. Public Building Commission of Chicago, respondent. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on June 27, 1996.

SUPREME COURT OF ILLINOIS
Springfield, IL 62701

No. 80597

ANITA L. BOWDEN
Petitioner

v.

PUBLIC BUILDING COMMISSION OF CHICAGO
Respondent

ORDER

EXTENSION OF TIME

FEBRUARY 27, 1996

SUPREME COURT OF ILLINOIS
Springfield, IL 62701

February 27, 1996

Ms. Anita H. Bowden
55 W. Chestnut
Chicago, IL 60610

In re: No. 80597 - Anita H. Bowden, petitioner, v. Public Building Commission of Chicago,
respondent

Dear Ms. Bowden:

The following order was entered this date in the above captioned case:

The motion by petitioner, pro se, for an extension of time to and including March 27, 1996, for filing petition for leave to appeal is allowed.

Very truly yours,

"s/Juleann Hornyak"

Clerk of the Supreme Court

JH:kf

cc: Susan Gunty

APPELLATE COURT OF ILLINOIS
First Judicial District

No. 94-3223

ANITA L. BOWDEN
Petitioner

v.

PUBLIC BUILDING COMMISSION OF CHICAGO
Respondent

ORDER

PETITION FOR REHEARING

JANUARY 23, 1996

No. 1-94-3223

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ANITA L. BOWDEN,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	No. 93 CH00835
	)	
	)	Honorable
PUBLIC BUILDING COMMISSION	)	Kenneth L. Gillis
OF CHICAGO,	)	Judge Presiding
	)	
Defendant-Appellee	)	

ORDER

Upon consideration of the Petition for Rehearing filed by Plaintiff-Appellant, IT IS HEREBY ORDERED that said petition is denied.

ORDER ENTERED

JAN 23 96

"s/William Constant"
JUSTICE

"s/Joseph Gordon"
JUSTICE

_____
JUSTICE

_____

GILBERT S. MARCHMAN,
CLERK OF THE APPELLATE COURT, FIRST DISTRICT

APPELLATE COURT OF ILLINOIS
First Judicial District

No. 94-3223

ANITA L. BOWDEN
Petitioner

v.

PUBLIC BUILDING COMMISSION OF CHICAGO
Respondent

ORDER TO SUBSTITUTE COUNSEL

DECEMBER 6, 1995

No. 1-94-3223

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ANITA L. BOWDEN,	)	
	)	No. 93 CH00835
Plaintiff-Appellant,	)	(Transferred to
	)	Law Division)
v.	)	
	)	
PUBLIC BUILDING COMMISSION	)	The Honorable
OF CHICAGO,	)	Kenneth L. Gillis
	)	Presiding
Defendant-Appellee	)	

ORDER

This CAUSE COMING TO BE HEARD by this Court on a motion of Plaintiff-Appellant, ANITA H. BOWDEN, to substitute counsel, due notice having been given;

IT IS HEREBY ORDERED that said MOTION FOR SUBSTITUTE COUNSEL is hereby granted.

ENTER: "s/William Constant"
JUSTICE

"s/jJill K. Mc Nulty"
JUSTICE

DATED

DEC 06 95

"s/Theo J. Brill"
JUSTICE

Anita H. Bowden
55 West Chestnut Street
Chicago, IL 60610
(312) 642-6045

Joseph Gordon

APPELLATE COURT OF ILLINOIS
First Judicial District

No. 94-3223

ANITA L. BOWDEN
Petitioner

v.

PUBLIC BUILDING COMMISSION OF CHICAGO
Respondent

ORDER FOR EXTENSION OF TIME

DECEMBER 6, 1995

No. 1-94-3223
IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ANITA L. BOWDEN,	)	
	)	No. 93 CH00835
Plaintiff-Appellant,	)	(Transferred to
	)	Law Division)
v.	)	
	)	
PUBLIC BUILDING COMMISSION OF CHICAGO,	)	The Honorable Kenneth L. Gillis Presiding
	)	
	)	
Defendant-Appellee	)	

ORDER

This CAUSE COMING TO BE HEARD by this Court on a motion of Plaintiff-Appellant, ANITA H. BOWDEN, for an extension of time to file a Petition for Rehearing, due notice having been given.

IT IS HEREBY ORDERED that said SECOND MOTION FOR EXTENSION OF TIME TO FILE PETITION FOR REHEARING is hereby granted. Petition due by January 5, 1996.

ENTER: "s/William Constant"
JUSTICE

DATED "s/jJill K. Mc Nulty"
JUSTICE

DEC 06 95

"s/Theo J. Brill"
JUSTICE

Anita H. Bowden
55 West Chestnut Street
Chicago, IL 60610
(312) 642-6045

Joseph Gordon

APPELLATE COURT OF ILLINOIS
First Judicial District

No. 94-3223

ANITA L. BOWDEN
Petitioner

v.

PUBLIC BUILDING COMMISSION OF CHICAGO
Respondent

ORDER FOR EXTENSION OF TIME

OCTOBER 31, 1995

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
No. 1-94-3223

ANITA L. BOWDEN,	)	
	)	
Plaintiff-Appellant,	)	
	)	No. 93 CH00835
v.	)	(Transferred to
	)	Law Division)
PUBLIC BUILDING COMMISSION OF CHICAGO,	)	
	)	
	)	
Defendant-Appellee	)	

ORDER

Upon motion for Plaintiff-Appellant, and the Court being fully advised in the premises, an objection having been filed,

IT IS ORDERED THAT THE MOTION FOR EXTENSION OF TIME TO FILE A PETITION FOR REHEARING IN THIS CASE TO AND INCLUDING NOVEMBER 22, 1995 IS ALLOWED.

Anita H. Bowden
55 West Chestnut Street
Chicago, IL 60610
(312) 642-6045

"s/William Constant"
JUSTICE

JUSTICE

OCT 31, 1995

JUSTICE

GILBERT S. MARCHMAN,
CLERK OF THE APPELLATE COURT, FIRST DISTRICT

APPELLATE COURT OF ILLINOIS
First Judicial District

No. 94-3223

ANITA L. BOWDEN
Petitioner

v.

PUBLIC BUILDING COMMISSION OF CHICAGO
Respondent

ORDER

APPEAL

SEPTEMBER 29, 1995

FIFTH DIVISION - September 29, 1995

Notice:
The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing of the disposition of the same.

No. 1-94-322

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ANITA L. BOWDEN,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellant,	)	COOK COUNTY
	)	
v.	)	No. 93 CH 00835
	)	
PUBLIC BUILDING	)	THE HONORABLE
COMMISSION OF CHICAGO	)	KENNETH L. GILLIS,
	)	JUDGE PRESIDING
Defendant-Appellee	)	

ORDER

The plaintiff, Anita Bowden, filed suit against the defendant, Public Building Commission of Chicago, alleging negligence by the defendant in its failure to maintain a safe environment in the building where the plaintiff worked. The

plaintiff alleged that his negligence exposed her to toxic chemicals for 1972 to 1993 and damaged her health. The defendant filed a motion for summary judgment pursuant to section 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005 (West 1992)), contending that the plaintiff had not filed her complaint within the two-year period under the statute of limitations for personal injury actions. The plaintiff countered that her exposure from defendant's negligence was a continuing tort, so that her claim did not accrue until her exposure ended. The trial court granted the motion, from which plaintiff appeals.

We affirm.

The plaintiff worked for the City of Chicago in its Department of Health from 1972 until 1993. During this entire time, she worked in various laboratories in the basement of the Daley Center, a building which defendant operates. In 1972, plaintiff began work as a chemist in the hematology and lead chemistry laboratory. In 1986, plaintiff was transferred to the biochemistry laboratory after complaining about chemicals burning her lungs and eyes and making her sick. In September of 1993, the biochemistry lab was closed and plaintiff was transferred back to the hematology and lead chemistry lab. The plaintiff remained there until the lab closed in December 1993.

By 1984, plaintiff was having health problems associated with her job. Plaintiff saw a doctor in 1985 about

her health problems from work. In 1988, plaintiff wrote a letter to the Chicago Commissioner of Personnel to ask for a transfer to another city job due to her health problems from work. In the letter, plaintiff detailed a wide array of health problems that her work environment had caused her. She also explained in the letter that she had been a good employee for not suing the city or obtaining workers compensation. In the years from 1985-1990, plaintiff made at least ten attempts to change jobs due to the health environment of her workplace.

On March 8, 1993, plaintiff filed a complaint against the defendant alleging that its negligent design, construction, and maintenance of the Daley Center had been responsible for plaintiff's health problems. The plaintiff filed an amended complaint on September 7, 1993, and the defendant filed its answer on October 7, 1993. On June 7, 1994, the defendant moved for summary judgment under section 2-1005 on the grounds that plaintiff had not filed her complaint within the two-year period under the statute of limitations for personal injury actions. (735 ILCS 5/13-202 (West 1992).) The plaintiff countered that her exposure from defendant was a continuing tort, arguing that because this tort involved continuing and repeated tortious acts, the statute of limitations period did not begin to run until her exposure ended. However, on August 22, 1994, the trial court granted the motion, from which plaintiff appeals.

In summary judgment cases, we conduct a de novo review of the evidence in the record. (Espinoza v. Elgin, Joliet & Eastern Railway Co. (1995), 165 Ill. 2d 107, 113, 649 N.E.2d 1323.) The court must construe all evidence strictly against the movant and liberally in favor of the nonmoving party. (Espinoza, 165 Ill. 2d at 113.) Summary judgment is appropriate when there is no genuine issue of material fact and the move party's right to judgment is clear and free from doubt. (Espinoza, 165 Ill 2d at 113.) Although summary judgment is encouraged to aid the expeditious disposition of a lawsuit, it is a drastic means of disposing of litigation. (Espinoza, 165 Ill. 2d at 113.) Therefore, where reasonable persons could draw divergent inferences from the undisputed material facts or where there is a dispute as to a material fact, summary judgment should be denied. (Espinoza, 165 Ill. 2d at 114.)

In the instant matter, the facts are not in question. The plaintiff does not dispute that she knew the defendant had wrongfully caused her injuries for more than two years before filing her complaint. However, plaintiff argues that when a repeated and continuing tort occurs, the cause of action does not accrue until the wrongful conduct ceases.

We disagree. The underlying purpose of the statute of limitations is to require the prosecution of a right or action within a reasonable time to prevent the loss or impairment of

available evidence and to discourage delay in the bringing of claims. (Nolan v. Johns-Manville Asbestos (1984), 85 Ill. 2d 161, 171, 421 N.E.2d 864.) Nolan is a directly applicable case in which the supreme court examined an asbestos exposure claim. The Nolan plaintiff had worked as an asbestos insulator from 1941 to May 11, 1972, and he filed his complaint on May 9, 1975. The court wrote that "the cause of action accrues when the plaintiff knows or reasonably should know of an injury and also knows or reasonable should know that the injury was caused by the wrongful acts of another." (Nolan, 85 Ill. 2d at 169.) Nolan termed this formula as the "discovery rule" and held that its action was barred if its plaintiff knew more than two years before filing that his injuries had been caused by his exposure, even though the plaintiff had additional exposure less than two years before filing. (See (Nolan, 85 Ill. 2d at 171.) Thus, Nolan directly rejected plaintiff's theory, and Nolan commented that "once it appears that an injury was wrongfully caused, a party may not slumber on its rights." Nolan, 85 Ill. 2d at 171.

Other exposure cases have continued to follow Nolan and the discovery rule. In Werckenthein v. Bucher Petrochemical Co. (1993), 248 Ill. App. 3d 282, 618 N.E.2d 902, as in the instant matter, this court examined allegations of chemical exposure from inadequate ventilation in the workplace. In denying the Werckenthein plaintiff's claim, we

held, "Here, as in Nolan, it cannot be disputed that plaintiff knew of his cancers long before 1984 [and] plaintiff was put on notice long before 1984 that his cancers had been wrongfully caused***." (Werckenthein, 248 Ill. App. 3d at 289.) This court addressed diethylstilbestrol (DES) exposure in Millar-Mintz v. Abbott Laboratories (1994), 268 Ill. App. 3d 566,645 N.E.2d 278, and asbestos exposure in VaSalle v. Celotex Corp. (1987), 161 Ill. App. 3d 808, 525 N.E.2d 684. In both cases we wrote, "This 'discovery rule' obtains with respect to latent physical injuries regardless of whether the plaintiff's injury is sustained as the result of a single traumatic event or several ostensibly innocuous occurrences." (Millar-Mintz, 268 Ill. App. 3d at 570-71; VaSalle, 161 Ill. App. 3d at 810.) Both cases followed the discovery rule and held at the cause of action for exposure accrued when the plaintiffs knew they had been wrongfully injury. Millar-Mintz, 268 Ill. App. 3d at 571; VaSalle, 161 Ill. App. 3d at 811; see also Olson v. Owens-Corning Fiberglass Corp. (1990), 198 Ill. App. 3d 1039, 1044, 556 N.E.2d (asbestos exposure claim accrues upon discovery of injury).

The Illinois Supreme Court also recently followed Nolan in Jackson Jordan, Inc. v. Leydig, Voit & Mayer (1994), 158 Ill. 2d 240, 633 N.E.2d 627. The court looked to Nolan for guidance in its issue of the accrual of an attorney negligence claim. Jackson reiterated, "The discovery rule delays the commencement of the relevant

statute of limitations until the plaintiff knows or reasonably should know that he has been injured and that his injury was wrongfully caused." (Jackson , 158 Ill. 2d at 249.) The court then focussed solely on the timing of plaintiff's initial knowledge of injury, even though the defendants had made an additional incorrect legal assessment within the applicable statute of limitations. See Jackson, 158 Ill. 2d at 246-51.

The plaintiff relies heavily on Hyon Waste Management Services, Inc. v. City of Chicago (1991), 214 Ill. App. 3d 757, 574 N.E.2d 129, in which this court stated, "When a tort involves a continuing or repeated injury *** the statute of limitations does not begin to run until the date of the last jury or when the tortious acts cease." Hyon, 214 Ill. App. 3d at 763.) However, this statement from Hyon is dictum, as the Hyon court found there was a single event and no such repeated tortious acts. (See Hertel v. Sullivan (1994), 261 Ill. App. 3d 156, 161, 633 N.E.2d 36.) Hertel confronted the Hyon dictum because its plaintiff alleged a continuing tort of emotional distress. Hertel did not follow Hyon but instead used the discovery rule, concluding, "Plaintiff has not cited any Illinois authority which squarely holds the continuing tort rule should apply beyond nuisance or trespass cases, and we decline to apply such a rule as a matter of first impression in this case." (Hertel, 261 Ill. App. 3d at 161-162.) The present plaintiff attempts to dispute Hertel by citing City of Rock Falls v. Chicago Title & Trust

Co. (1973), 13 Ill. App. 3d 359, 300 N.E.2d 331. However, Rock Falls in another case of interference with property rights, and that case does not contradict the conclusions of Hertel. (See Rock Falls, 13 Ill. App. 3d at 362 ("tort action for interference [recognizes] that a person's business is property which is entitled to protection from harm by another").) Because other cases from this court and the supreme court - Nolan, Jackson, Werckenthein, Millar-Mintz, VaSalle, and Olson - directly contradict the dictum from Hyon, we agree with Hertel and hold that the continuing tort theory does not apply beyond the realm of property rights.

For the foregoing reasons, the judgment of the trial court is affirmed.

Affirmed.

COUSINS, P.J., with GORDON and T. O'BRIEN, JJ., concurring.

APPELLATE COURT OF ILLINOIS
First Judicial District

No. 94-3223

ANITA L. BOWDEN
Petitioner

v.

PUBLIC BUILDING COMMISSION OF CHICAGO
Respondent

ORDER

CORRECT RECORD ON APPEAL

MARCH 2, 1995

APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ANITA L. BOWDEN,	)	
	)	
Plaintiff/Appellant,	)	
	)	No. 94-3223
	)	
v.	)	Circuit Court No.:
	)	93 CH00835
PUBLIC BUILDING COMMISSION	)	(Transferred to
OF CHICAGO,	)	Law Division)
	)	
Defendant/Appellee	)	

ORDER

THIS CAUSE COMING ON TO BE HEARD upon the motion of Appellant to correct record of appeal, parties having notice and this court being advised in the premises,

IT IS HEREBY ORDERED that Appellant's motion is denied.

Objections filed.

_____, 1995

ENTER:

ORDER ENTERED
MAR 02 95

"s/William Constant"
Judge Judge's No.

CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Nos. 93 CH 00835 and 94L 811712

ANITA L. BOWDEN
Petitioner

v.

PUBLIC BUILDING COMMISSION OF CHICAGO
Respondent

ORDER

AUGUST 22, 1994

CIRCUIT COURT OF COOK COUNTY, ILLINOIS

ANITA BOWDEN

No. 93 CH 00835
94L 811712
transferred
to Law Division

PUBLIC BLDG. COMMISSION
OF CHICAGO

ORDER

This cause coming to be heard on motion of the defendant for summary judgment, due notice having been given and the court being fully advised in the premises,

It is hereby ordered:

Defendant's motion for a final and appealable order granting summary judgment is allowed, Plaintiff to go hence without day; there is no just reason to delay enforcement or appeal hereof.

Atty No.	27901	AUG 22 1994
Name	Gurty & McCarthy	
Attorney for	Defendant	
Address	150 So. Wacker	_____, 19__
City	Chicago	
Telephone	541-0022S	ENTER:

"/Kenneth L. Gillis"
Judge Judge's No.

AURELIA PUCINSKI, CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
0000292

USCS § 9658. Actions under state law for damages from exposure to hazardous substances

(a) State statutes of limitations for hazardous substances cases.

(b) Definitions.

(4) Federally required commencement date.

(ii) In the case of an incompetent individual, the date on which such individual becomes competent or has had a legal representative appointed.

CITY OF CHICAGO
Report of Occupational Injury of Illness

Department	Bureau/Division
Health	Division of Laboratories
Social Security No.	Payroll No
356-36-9965	2502
Ward/District	Municipal
42 /	Blue Cross
Name of Employee	Job Title
Bowden, Anita L.	Chemist I
Home Address	Home Telephone
55 West Chestnut Street-1204 Chicago, IL 60610	(312) 642-6045

Sex	Age	Marital Status	Wages
F	45	Single	$2,479.00/month

Service Time with City	Normal Working House
18 years	8:30 a.m. to 4:30 p.m.

Supervisor	Day of Injury/Illness	Date Reported
Dr. M. Su	9/12/1991	9/12/1991

Was Injury/Illness While on Assigned Department Duties?
Yes

Location of Incident by Address
50 W. Washington, Daley Center, Chicago, IL 60602

Type of Area Where Incident Happened?
Job-Site

Lost Time?	First Full Day Off Work	Last Day for Pay
Yes	9/13/91	9/11/91 Part of 9/12/91

APPENDIX 30

Details of injury/Illness. What Caused the Incident? What Duty was Employee Performing?
Be Specific and Accurate

On 9/12/91 my supervisor sent me to work in hematology. After working there for almost 2 hours where flames from Bunsen burners sucked oxygen from the air, and after going back and forth into the adjoining lead chemistry lab many times - where toxic vapors from mixtures of trichloroacetic acid, sodium hydroxide, methyl isobutyl ketone, ammonium pyrrolidine dithiocarbamate, etc. were expelled into the air - I became ill. I couldn't breathe, my lungs choked, felt suffocated, heavy/tight chested, nauseated from vapors, weak, heart fluttered, and like I'd pass out and die. I was called to Dr. Orbach's office; by time I got there, I felt worse. An ambulance was called and took me to Northwestern Hospital emergency room. Everyday when I'm in the 2nd basement of the Daley Center, where the labs surround the boiler room, I feel bad - due to the bad air.

Employee Hospitalized? No	Medical Services Rendered City Designated Medical Facility Personal Physician	
Name of Witness Carolyn Rodriguez	Name of Witness Nance Dulaj	
First Person Notified Nalda Marzette	Title Chemist IV	Business Telephone (312) 744-3838
Signature "/Anita L. Bowden"	Date 9/19/91	

Supreme Court, U.S.
FILED
DEC 9 1996
CLERK

(2)

No. 96-729

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ANITA L. BOWDEN,

Petitioner,

v.

PUBLIC BUILDING COMMISSION OF CHICAGO,

Respondent.

On Petition for Writ of Certiorari to the Illinois Appellate Court, First District

RESPONDENT'S BRIEF IN OPPOSITION

SUSAN GUNTY, ESQ.
Counsel of Record
GUNTY & McCARTHY
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Suite 1025
Chicago, Illinois 60606
(312) 541-0022
Attorneys for Respondent

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

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ARGUMENT

I.

This Case Is Not Properly Before The United States Supreme Court Pursuant To U.S. Supreme Court Rule 10

This case is not properly before the United States Supreme Court. U.S. Supreme Court Rule 10 clearly states the character of reasons used to determine the reviewability of a decision by a state court. The U.S. Supreme Court will only review these decisions when:

> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. U.S. SUP.CT. R.10

The petition does not present questions of constitutional rights and discrimination. A close examination beyond the first page of said petition reveals no support for those questions in the form of case law or argument. The petitioner merely sets out those questions at the beginning and fails to address them anywhere in the petition.

The petition does not present an important federal question nor does it present a conflict between the Illi-

nois appellate opinion in this case and any opinions of the U.S. Supreme Court, U.S. appellate courts or any other state courts of last resort regarding any federal question, "important" or otherwise.

The petition does attempt, however, to have this Court reinterpret the facts of this case under a new position or theory being presented for the first time at this level of appeal. This kind of review, is that in which this Court has refused to engage.

The plaintiff-petitioner argued the "continuing tort" theory at the trial court level to oppose the defendant-respondent's motion for summary judgment. The defendant-respondent relied on the discovery rule which the plaintiff argued was inapplicable to this case. The plaintiff-petitioner presented the same continuing tort theory arguments at the Illinois Appellate Court level. The Illinois Appellate Court affirmed the trial court decision.

The plaintiff-petitioner tried to recreate her argument in her petition to the Illinois Supreme Court arguing for the first time that the "discovery rule" was now applicable in favor of the plaintiff-petitioner and that the trial court misinterpreted the facts. The Illinois Supreme Court denied certiorari and the petitioner now seeks to present this new argument.

Since 1925, this Court has expressly refused to grant certiorari to review evidence and discuss specific facts. U.S. SUP.CT. R. 10; *Edward Hines Yellow Pine Trustees v. Martin*, 268 U.S. 458, 45 S.Ct. 543 (1925); *U.S. v. Johnston*, 268 U.S. 220, 45 S.Ct. 496 (1925); *See also Texas v. Mead*, 465 U.S. 1041, 104 S.Ct. 1318 (cert. den. 1984) (reaffirming the Court's position on the standard of review). However, this petitioner seeks to have this

Court do precisely that. The petitioner merely wishes to have this court question the trial court's interpretation of the evidence, an interpretation which the petitioner has not disputed until this highest level of appeal. Petitioner admits in paragraphs 2 and 3 of her statement of the case that she is presenting new arguments not presented to the lower courts. Since this Court has expressly refused to engage in this kind of review, the petition for writ of certiorari must be denied.

II.

Petitioner Cannot Present New Issues On Appeal Which Were Not Presented To The Appellate Court

Petitioner first raised the argument that the discovery rule applies to her case which she denied in her arguments to the Illinois circuit and appellate courts before the Illinois Supreme Court which denied the petition for a writ of certiorari. Effectively, the petitioner wishes to abandon her original continuing tort theory, argued in the Illinois circuit and appellate courts, and avail herself of this new theory.

In the U.S. Supreme Court, as it is in the Illinois Supreme Court, issues not argued in or presented to the appellate court may not be argued in or presented to this Court for the first time. *Moore v. State of Illinois*, 408 U.S. 786, 92 S.Ct. 2562 (1972); *Beck v. Washington*, 369 U.S. 541, 82 S.Ct. 1575 (1962); *Hammond v. North American Asbestos Corp.*, 97 Ill.2d 195, 454 N.E.2d 210 (1983); *Clore v. Fredman*, 59 Ill.2d 20, 319 N.E.2d 18 (1974); *Peo. ex rel. Dept. of Transp. v. Walliser*, 258 Ill.App.3d 782, 629 N.E.2d 1189 (3d Dist. 1994). Questions not

called to the attention of the appellate court are thereby waived for purposes of further appeal to the Supreme Court. *Walliser, supra*; *Meyers v. Kissner*, 149 Ill.2d 1, 594 N.E.2d 336 (1992).

In the instant case, defendant-respondent argued the discovery rule in its motion for summary judgment in the circuit court. The plaintiff-petitioner argued against the application of the discovery rule and asked the court to apply instead the continuing tort theory. The circuit court (as well as the Illinois Appellate Court) had all the facts before it in determining the outcome of this litigation including the facts which petitioner now argues support her petition for appeal to this Court. The circuit court ruled against the plaintiff-petitioner and applied the discovery rule in granting summary judgment for the defendant-respondent. Subsequently, the plaintiff-petitioner sought to have the appellate court reverse the circuit court's ruling based on the same continuing tort theory arguments. The appellate court affirmed the circuit court's ruling holding that the trial court was correct in applying the discovery rule and that the continuing tort theory did not apply to this case. Consequently, this Honorable Court should deny the petition for writ of certiorari.

III.

The Illinois Appellate Court Was Not Required To Pass On The Issue Of The Trial Court's Determination Under The Discovery Rule

The petitioner incorrectly "argues" in her statement of the case that the Illinois Appellate Court improperly determined when she knew or reasonably should have

known of her injury. She further argues that the Illinois Appellate Court placed excessive emphasis on the continuing tort theory thereby failing to "evoke" [sic] the discovery rule.

First, the plaintiff-petitioner's appeal to the Illinois Appellate Court merely sought to have the court determine that the continuing tort theory should apply to her case as opposed to the discovery rule which the trial court relied upon in granting summary judgment. The plaintiff-petitioner at either the trial or appellate levels that the discovery rule was not applied correctly. In fact, the Illinois Appellate Court disposed of that issue:

> In the instant matter, the facts are not in question. The plaintiff does not dispute that she knew the defendant had wrongfully caused her injuries for more than two years before filing her complaint. *Bowden v. Public Building Commission of Chicago*, No. 1-94-3223 (Ill.App.Ct. 1 Dist. Jan. 23, 1996).

At that point, the Illinois Appellate Court turned to the only issue presented, i.e., the plaintiff-petitioner's continuing tort theory.

The Illinois Appellate Court affirmed the trial court holding that the continuing tort theory did not apply and that the trial court was correct in applying the discovery rule to the undisputed facts regarding where she knew of her injury and its allegedly wrongful causation. It is axiomatic to say that since the question was not presented on appeal, the Illinois Appellate Court was not required to pass on the issue of *how* the trial court applied the discovery rule.

CONCLUSION

Therefore, respondent, PUBLIC BUILDING COMMISSION OF CHICAGO, respectfully requests that petitioner's Petition for Writ of Certiorari be denied.

Respectfully submitted,

SUSAN GUNTY, ESQ.
Counsel of Record
GUNTY & McCARTHY
150 South Wacker Drive
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Chicago, Illinois 60606
(312) 541-0022
Attorneys for Respondent

No. 96-729 (3)

Supreme Court, U.S.
FILED
DEC 18 1996
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ANITA L. BOWDEN

Petitioner,

v.

PUBLIC BUILDING COMMISSION OF CHICAGO

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE ILLINOIS APPELLATE COURT,
FIRST DISTRICT

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

ANITA H. BOWDEN
55 WEST CHESTNUT STREET
CHICAGO, IL 60610
(312) 642-6045

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STATUTES

28 U.S.C.A. - Rule 56 3

I.

THIS CASE IS PROPERLY BEFORE THE UNITED STATES SUPREME COURT PURSUANT TO U.S. SUPREME COURT RULE 10

The trial court improperly granted summary judgment to the Defendant due to insufficient evidence. Summary judgment was inappropriate and in violation of the original federal law, use and intent. The Illinois Appellate and Illinois Supreme Courts affirmed the trial court's decision.

Plaintiff/Petitioner was denied adequate, complete, fair, full, meaningful and timely access to the court under the First Amendment to the Constitution of the United States, and made applicable to the State of Illinois by the Fourteenth Amendment of the U.S. Constitution; denied trial by jury pursuant to the Seventh Amendment of the U.S. Constitution; denied due process of law; and deprived of life and liberty without due process of law under the Fifth Amendment.

Only when no genuine issue of material fact exists, court may, without violating U.S.C.A. Amendment 7 rights, grant summary judgment.

It is the prerogative of the U.S. Supreme Court to determine if this case is properly before it and if the petition does or does not present important federal questions or conflict between the Illinois Appellate opinion and that of other courts.

Even though Plaintiff's attorney included incorrect and incomplete information and did not present her case in the most efficient, professional and clear way, the correct information can be found in the deposition records, which could have been deciphered with little effort. Plaintiff admits she did not catch mistakes in the Plaintiff's Response to the Defendant's Motion for Summary Judgment

and was not allowed to review the 1994 Appellate brief before her first attorney submitted it.

The Illinois courts ignored or misinterpreted the correct information and assumed wrong information. No new information or argument was presented to the Illinois Appellate Court which could not be found in the records.

If the attorneys and judges failed to submit all important deposition pages and reports into the main records that could have clarified confusing information and made Plaintiff's case go more effectively and more quickly, then Plaintiff was surely discriminated against. The Defendant's Motion for Summary Judgment was based on answers confined to questions of liability to the Plaintiff and did not address questions allowing defense, elaboration or explanation by Plaintiff.

The complete 9/12/91 accident, 4/16/92 doctor's report, Motion to Correct Record on Appeal, Appellate Record pages R66/91/144, Defendant's Appellate Brief pages 125/272/323/515/516/561 and Deposition Transcript pages 177/180/297/298/334/534/536/537 taken by Patricia G. Talomo Court Reporters, 79 West Monroe Street, Suite 1219, Chicago, Illinois 60603 should have all been included in the main records given to Appellate Court. Some of these reports/pages are listed in the Appendix attached hereto.

It is untrue that the Petition attempts to ask this Court to reinterpret the facts of this case under a new position or theory being presented for the first time at this level of appeal.

It is untrue Plaintiff attempted to recreate her argument in her Petition to the Illinois Supreme Court by arguing for the first time that the "discovery rule" was now applicable in favor of the Plaintiff and that the trial court misinterpreted the facts.

It is untrue Plaintiff admits in paragraphs 2 and 3 of her statement of the case that she is presenting new arguments not

presented to the lower courts. All complete and correct information can be found in the deposition records, doctors' and accident reports, briefs, and Plaintiff's Response to Defendant's Motion for Summary Judgment.

In resolving Defendant's Motion for Summary Judgment, facts must be assumed that are most favorable to Plaintiff. McKnight v. N.M. Paterson & Sons, Ltd., D.C. Ohio 1960, 181 F Supp. 434 affirmed 286 F.2d 250.

Where no genuine issue of material fact exists, the court may, without violating U.S.C.A. Amendment 7 rights, grant summary judgment. Shore v. Parklane Hosiery Co. Inc., C.A.N.Y. 1977, 565, F.2d 815.

When direct evidence produced by party moving for summary judgment conflicts with that produced by nonmoving party, the judge must assume truth of evidence set forth by nonmoving party with respect to that fact. Quiming v. International Pacific Enterprises Ltd., D. Hawaii 1990, 773 F. Supp. 230.

The provisions of U.S.C.A. Rule 56 were well summarized soon after its original adoption in Whitaker v. Coleman (CCA 5th, 1940), 115 F.2d 305 when in this case it was pointed out that summary judgment is not designed to deprive the parties of a trial if any genuine issue of fact exists.

In Plaintiff/Appellant's brief to the Illinois Appellate Court, her first attorney did argue that the Continuous Tort Doctrine should be applied to this case.

Defendants argued that the Continuous Tort Doctrine only applies to trespass and nuisance actions and should not and has not been applied to negligence or other types of tortious conduct. Defendants cited cases in support of limiting the application of this doctrine to trespass actions.

Plaintiff's first attorney pointed out that there is other case law

to the contrary which closely parallels the facts in the case at bar, Meadows v. Union Carbide Corp., 710 F. Supp. 1163 (N.D. Ill. 1989). Here Meadows was exposed to toxic chemicals at work from 1980-85. He filed a lawsuit 8/14/86. Union Carbide argued the "discovery rule" barred Plaintiff's suit because he knew in 1980 that the chemicals caused his injuries. The court held that the discovery rule did not apply to this case when the Defendant's negligence is continuing in nature and that the Statute of Limitations would not begin to run until the date of the last exposure.

City of Rock Falls v. Chicago Title & Trust Co., 13 Ill. App. 3d 359, 300 N.E. 2d 331 (3rd Dist. 1972) and Meadows v. U.C. clearly establishes that Illinois has not limited the Continuing Tort Doctrine to trespass and nuisance actions.

Defendants also argued before the trial court that the date of accrual is the date that Plaintiff knew or had reason to know her injury was caused by Defendant's negligence. Plaintiff's first lawyer pointed out that the cases cited by the Defendants are inapplicable because they do not concern a continuing tort. In virtually all cases cited by Defendant, the alleged tortious conduct ceased more than two (2) years before the lawsuit was filed.

The only case cited by Defendant which specifically discussed the application of the continuing tort was Hertel v. Sullivan. In Hertel, the court was reluctant to apply the Continuing Tort Doctrine because it was not aware of any other cases applying this theory beyond trespass and nuisance.

As noted, there are cases applying this doctrine to negligence and other types of tort actions. Also see: Hamilton v. Smith, 773 F 2d, 461, 467 (2d Cir. 1985), Page v. United States, 729 F 2d 818, 823 (D.C. Cir. 1984).

Plaintiff's first attorney stated that Plaintiff's knowledge under the "discovery theory" as espoused by Defendant, is irrelevant when

Defendant's conduct is continuous or recurring.

II.

PETITIONER DID NOT PRESENT NEW ISSUES ON APPEAL WHICH WERE NOT PRESENTED TO THE APPELLATE COURT

In the trial court, Plaintiff's first attorney argued a "continuing tort" theory while simultaneously evoking the "discovery rule". The continuing tort and discovery rule were argued simultaneously but Plaintiff's attorney emphasized the continuing tort theory since Plaintiff was exposed to specific chemical fumes as listed in Dr. A. Greene's 4/16/92 doctor's report and 9/12/91 accident report from 1972 to 1986, one day on 9/12/91 and from 9/93 to mid-December 1993. Plaintiff's first attorney mistakenly said Plaintiff was exposed to these fumes from 1972 through December 1993. He minimized discovery rule but did not completely reject it.

Plaintiff's subsequent attorneys emphasized the discovery rule when each submitted the Petition for Rehearing to the Illinois Appellate Court and the Petition for Leave to Appeal to the Illinois Supreme Court.

Even if the Plaintiff's attorney did argue the "continuing tort" theory, which the trial court rejected, the trial, Appellate and Supreme Courts should not have granted summary judgment to the Defendant if there was insufficient evidence to grant it properly and honestly.

III.

THE ILLINOIS APPELLATE COURT SHOULD HAVE BEEN REQUIRED TO PASS ON THE ISSUE OF THE TRIAL COURT'S DETERMINATION UNDER THE DISCOVERY RULE

The facts were disputed and thus the Illinois Appellate Court should have attempted to pass on the issue of the trial court's determination under the discovery rule.

The court misconstrued the evidence before it. Plaintiff does dispute when she should have reasonably known of her injuries or reasonably should have known that the injury was wrongfully caused by Defendant. In Plaintiff's Response to the Defendant's Motion for Summary Judgment, Plaintiff states:

> "Nevertheless, the Plaintiff did not know until April 16, 1992 that she had permanent lung damage as a direct result of her exposure to the air in Defendant's building. This information was provided by her doctor, Andrew Greene, M.D. (See Affidavit of Bowden.) Moreover, Plaintiff did not know, nor should she have known, that she suffered from brain dysfunction until after she filed her complaint." (See Record, pg. 144.)

It is true, as the court's Order points out, that Plaintiff argued that when a repeated and continuing tort occurs, the cause of action does not accrue until the wrongful conduct ceases. The court disagreed with this argument and ruled against her. However, it is evident in the record that Plaintiff, while discussing the continuing tort theory, also contended that she did not actually discover or have reasonable knowledge that she had been seriously injured until April 16, 1992. Although inartfully pleaded, Plaintiff did, in effect, evoke the "discovery rule" by stating that she did not have reasonable

knowledge of her injuries until that point of "discovery". By ruling only on the basis of the "continuing tort" argument, the courts failed to recognize that a material fact affecting the application of the "discovery rule" was, in fact, at issue.

In brief, while rejecting Plaintiff's "continuing tort" theory, the courts failed to rule on Plaintiff's "discovery rule" theory. This Court should now reconsider the Appellate and trial courts' prior ruling and turn its attention to the date of discovery.

The Illinois Appellate Court's opinion concentrates on the "continuing tort" argument. It only mentions in passing that Plaintiff does not dispute that she knew that Defendant had wrongfully caused her injuries for more than two years before filing her complaint. Not saying any more than this, lacking further elaboration, it is evident that the Appellate Court has given full weight to the Appellee's interpretation of the facts.

In paragraph 2, page 5 of Plaintiff/Appellant's brief to the Illinois Appellate Court, it states that on 4/16/92 Dr. Andrew Greene, Jr. informed Plaintiff that this continued exposure caused permanent damage to her lungs. C. 145-48. In the last paragraph of page 15, it states it is important to note that Plaintiff did not know, nor should she have known, that she suffered from brain dysfunction until after she filed her complaint. C. 145-48.

Dr. H. Stevenson, who had been Plaintiff's doctor since approximately 1985, referred her to Dr. Greene, a lung specialist, in late 1991 after her 9/12/91 exposure to fumes. Dr. Greene wrote a letter to Dr. Stevenson dated 4/16/92 advising him that specific chemicals at work caused damage to her lungs. If Dr. Stevenson had told Plaintiff in earlier years that chemicals at work had caused her any lung problems, it does not seem logical that in 1991 it would have been necessary for Dr. Greene to send Dr. Stevenson that 4/16/92 report/letter informing him of such.

Dr. Greene also stated that Plaintiff's reexposure to these chemicals on 9/12/91 irritated and aggravated her lung condition. When Plaintiff worked in the biochemistry lab from 1986 to 9/93, except one day on 9/12/91, she did not think she was still exposed to those same chemicals emanating from the hematology/clinical chemistry/lead lab.

Plaintiff was told by an authority of her employer that he had no reason to believe that if she has a health condition it is work related.

In the Appellate Court Order it states that Plaintiff said that she had been a good employee for not suing her employer. Plaintiff mentioned cancer but never argued that she had contracted it or that her employer had caused it.

Plaintiff did get glass in her eye from a centrifuge at work, fell out of a broken chair at work and barely escaped Defendant's ceiling which fell on chair where Plaintiff had recently sat. Plaintiff did not take any legal action against her employer or Defendant, her employer's landlord.

CONCLUSION

Therefore, Petitioner, ANITA BOWDEN, respectfully requests that her Petition for a Writ of Certiorari be granted.

Respectfully submitted,

Anita H. Bowden
55 West Chestnut Street
Chicago, IL 60610
(312) 642-6045

APPENDIX 1

Andrew B. Greene, Jr., M.D.
1940 E. 87th Street - Suite 13
Chicago, Illinois 60617

Telephone: (312) 734-1577

April 16, 1992

Dr. Howley Stevenson
1807 West 95th Street
Chicago, Illinois 60643

Dear Dr. Stevenson:

Thank you for referring Ms. Anita Bowden to me for her respiratory problems. Ms. Bowden gives a history of working for the Chicago Health Department as a chemist to the chemistry labs in the second basement of the Daley Center for the last 19 years. She gives a history of having respiratory and other problems due to the overall air quality and toxic chemical's in the basement.

Ms. Bowden further relates that for the first thirteen years, she worked with or around such chemicals as Methyl Isobutyl Ketone, Ammonium Pyrolidine Dithocarbamate, Trichloroacetic Acid, Sodium Hydroxide and Mercury, as well as other chemicals in her work environment. Data on these chemicals indicate that they are irritating and harmful to the airway and other parts of the body. Six years ago, she was transferred to another chemistry lab located in the second basement of the Daley Center.

However, on September 12, 1991 she was reassigned to her original lab area. She experienced on acute exacerbation of shortness of breath and had to be rushed to the emergency room of Northwestern Hospital. She also admitted to having chest tightnss, nausea, palpitations and weakness at that time. She further states that since that time she has not recovered back to her usual state of health, although she felt better since being assigned away from this area.

Ms. Bowden has had several visits to the office and her physical examinations have been remarkable for decreased air flow on auscultation of the lungs without wheezing rhonchi or rales. She has had a number of laboratory tests prior to and after her acute illness of Sept. 12, 1991. I have had the opportunity to review the tests you forwarded to me as well as additional tests. Ms. Bowden's recent chest x-ray is essentially normal. The x-ray report from Columbus Hospital done in 1985 stated several small calcifications from past inflammatory disease exist. Her pulmonary function tests show a persistent restrictive defect since 1985. Pulmonary function tests were performed on Sept. 27, 1991 by her employer's doctors. Their records show an improvement in the Oct. 17, 1991 study.

A Gallium Scan of the lungs, which was performed at Northwestern Hospital showed a mild uptake in the left peripheral area and showed that Sarcoidosis could not be ruled out. She was offered a Bronchoscopy and Transbronchial Lung Biopsy, but declined to have the procedure done because of her fear of easy susceptibility to infections, religious reasons and other grounds. Based on her past and present medical and work history, I feel the above mentioned chemicals she has worked with and around for thirteen years caused permanent damage to her lungs. Her reexposure to these chemicals on Sept. 12, 1991, irritated and aggravated her lung condition. In any

event, her underlying chronic lung condition is worsened when exposed to an irritating environment.

I recommend that the patient not return to the areas where the above described chemicals are used. She should infact avoid environments where poor air quality exist and it is recommended that she work in well ventilated areas.

If you have any further questions, please feel free to call.

Sincerely,
s/Andrew B. Greene, Jr., M.D.
Andrew B. Greene, Jr., M.D.
Pulmonary Medicine